91-1426

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

STEPHEN ROSS HARDEN

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a police officer's objectively reasonable belief that a person consented to an entry satisfy the Fourth Amendment and the deterrence purpose of the exclusionary rule, or must the state prove the person in fact knowingly consented?

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Sixth Appellate District, which was entered on September 4, 1991.

OPINIONS BELOW

The opinion of the California Court of Appeal is not reported. A copy of the opinion is attached to this petition as Appendix A. The California Supreme Court denied the state's Petition for Review on December 11, 1991. A copy of the order of denial is attached to this petition as Appendix B.

JURISDICTION

The judgment of the California Court of Appeal was filed on September 4, 1991. The California Supreme Court denied review on December 11, 1991, at which time the judgment of the Court of Appeal became final and reviewable by this Court. California Rules of Court, rules 24(a), 25(a), 28(f). This petition for a writ of certiorari follows within 90 days of the latter date. 28 U.S.C. § 2101(f); Supreme Court Rules, rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

STATEMENT OF THE CASE

Procedural History

A complaint filed in the Santa Clara County, California, Municipal Court on October 13, 1989, charged respondent Stephen Ross Harden with possession of methamphetamine for sale and possession of marijuana. Cal. Health & Saf. Code, §§ 11357, subd. (b), 11378. CT 296-297.[1]

At the preliminary hearing and in the trial court, Harden moved to suppress evidence as the fruit of an illegal seizure. Cal. Pen. Code, § 1538.5, subd. (f) &

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1. "CT" refers to the Clerk's Transcript on Appeal. "RT" refers to the Reporter's Transcript.

subd. (i). The magistrate and the trial court denied the motion. CT 1, 284-285, 292-294, 309, 350.[2/]

Harden pleaded guilty and was granted probation. CT 349, 353.

The California Court of Appeal, Sixth Appellate District, reversed the judgment on September 4, 1991. Appendix A.

The California Supreme Court denied petitioner's application for review on December 11, 1991. Appendix B.

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2. Where, as here, the defendant makes a suppression motion at the preliminary hearing, California Penal Code section 1538.5, subdivision (i) makes the magistrate the fact finder and generally makes the magistrate's findings "binding" on the superior court in the event of a renewed pretrial suppression motion in that court. The superior court functions as a reviewing court on such a renewed motion, bound to resolve factual conflicts and draw inferences in favor of the magistrate's ruling. On further appellate review of a suppression motion, the state appellate courts must give the magistrate's express and implicit determinations the same deference formerly given them by the superior court. *People v. Trujillo*, 217 Cal.App.3d 1219, 1223-1224, 266 Cal.Rptr. 473 (1990).

Our statement of facts is from the evidence presented to the magistrate at the preliminary hearing. No additional evidence was presented on respondent's renewed motion in the superior court.

STATEMENT OF THE FACTS

In the early morning of October 11, 1989, four police officers responded to a report of suspicious activity in room 405 of the Woodmark Hotel in Santa Clara. CT 6-7, 76, 111-112. The officers testified that when they arrived at the room the door was ajar approximately one or one and a half inches. CT 7, 25, 74, 94, 167. Officer Henry knocked on the door. The force of the knock caused the door to open further. CT 7, 27-28, 74, 94, 167-168, 180. Through the partially open door, Officer Henry saw a person sitting or kneeling on the floor about four feet from the door. CT 167-169, 180. Officer Henry said, "Hello." Voices within answered back. Officer Henry announced they were police investigating a report of suspicious activities and asked for permission to enter. Two officers near the door heard one or two voices answer "yes." CT 8-9, 33-34, 169, 180. Other officers, farther back from the door, did not hear a response. CT 75, 84-85, 91, 94-95, 110.

Officer Henry stepped inside. CT 170, 209. James Bowen was sitting on the floor between the

doorway and the bed. Sindy Bowen was sitting on the bed. Stephen Harden was on the couch. CT 170-171, 207, 14-15, 67-68.

The officers saw in plain view marijuana cigarettes, loose green vegetable matter, an "Ohaus" scale, a police scanner, and a telephone paging device. CT 9-14, 49-41, 71, 80-81, 88, 171. Officer Henry asked for and received permission to search the room. CT 172, 182. The search produced marketable quantities of methamphetamine, drug packaging and cutting materials, and $1,500 in cash. CT 9-14, 37, 49-54. A search of respondent Harden incident to arrest produced two plastic baggies containing 14.5 grams of methamphetamine, marijuana cigarettes, $735 in cash, and an airline ticket to Las Vegas. CT 20-22, 44, 222-223.

The room's occupants testified that they did not hear any knock or announcement before the police officers entered. James Bowen testified that he heard his wife say, "Jimmy" before he saw the police officers in the room. CT 246, 249, 250-251.

The magistrate viewed the hotel room. CT 138. The magistrate directed the defense investigator to knock on the door while it was standing slightly ajar. Before the knocking, the magistrate could see light from the room through the space between the door and the jamb, but could not see the inside of the room. CT 146. When the employee knocked three times, the door opened one to one and a half inches, allowing a view into the room of about a quarter of an inch. Upon harder knocking, the magistrate could see slightly more of the room. CT 147-149.

Magistrate's Findings

The magistrate made the following findings: (1) Officer Henry knocked on the door, causing it to open "a couple of inches." (2) After the door opened, Officer Henry got a brief view of someone sitting on the floor who said "hello." (3) Officer Henry announced the officers' purpose and asked for permission to enter. (4) The officer believed he heard "yes" from within. CT 284-285.

The magistrate concluded that, whether or not an occupant actually said "yes," the officer's reasonable belief that he heard "yes" justified the police entry. CT 285.

Holding Of The Court Of Appeal

The court of appeal held: "When the People seek to justify a search on the ground consent was given, they have the burden of proving that the defendant's manifestation of consent was *knowingly, freely and intelligently* given. [Citation.] . . . Here, the People did not meet their burden of proving that consent was knowingly given, as the magistrate refused to find that defendants' testimony [that they had not given the officers permission to enter] was not credible." Typed opinion at p. 11, citing *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) and *Johnson v. Zerbst*, 304 U.S. 458 (1938); italics added.

REASONS FOR GRANTING THE PETITION

1. This Court has long recognized that consent searches are an important part of the standard investigatory techniques of law enforcement agencies. "In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. . . . And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. . . . [A] search pursuant to consent may result in considerably less inconvenience for the subject of the search. . . ." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-228 (1973).

In short, this Court has held that a consent search "is a constitutionally permissible and wholly legitimate aspect of effective police activity," *id.* at 228, and that

police officers who conduct a search based on consent act "reasonably," as required by the Fourth Amendment. "[W]e we have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Florida v. Jimeno*, ___ U.S. ___, 111 S.Ct. 1801, 1803 (1991).

Difficulty arises because no court can determine whether officers lawfully relied on consent without choosing between two conflicting standards enunciated by this Court. A court following the standard applied in *Bumper v. North Carolina*, *supra*, 391 U.S. at 543 and *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at 218, must invoke the exclusionary rule if the state fails to prove the person *in fact* voluntarily consented. If the court chooses the test applied by this Court in *Illinois v. Rodriguez*, 497 U.S. ___, \110 S.Ct. 2793 (1990) and *Florida v. Jimeno*, *supra*, 111 S.Ct. 1801, it must not invoke the exclusionary rule if the state proves the officers acted reasonably in believing consent was given, even if the state fails to prove consent was actually given. Whether the evidence will be

excluded in a given case may be wholly dependent on the court's preference for one test over the other.

This Court should act now to ensure that police officers who act reasonably are no longer punished by courts that invoke the exclusionary rule believing that only proof of actual consent will satisfy the Fourth Amendment. This case squarely presents the issue for resolution. The magistrate admitted the evidence because the officers reasonably believed they received consent. The Court of Appeal excluded the evidence because the state failed to prove that knowing consent was actually given.

2. Presumably because it would be unreasonable to require law enforcement officers to divine the actual subjective intent or understanding of the person consenting, this Court has held that the Fourth Amendment permits officers to act if, on the totality of the circumstances known to them at the time, it is objectively reasonable for them to believe they have received consent.

In *Florida v. Jimeno*, *supra*, 111 S.Ct. at 1803-1804, this Court held that the *scope* of a consent to search must be measured by the objective reasonableness of the officer's conclusion that a consent to search a car included consent to search a closed bag within that car. "The touchstone of the Fourth Amendment is reasonableness. *Katz v. United States*, 389 U.S. 347, 360 (1967). The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable. *Illinois v. Rodriguez*, 497 U.S. ___, 110 S.Ct. 2793 (1990). . . . The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness -- what would a reasonable person have understood by the exchange between the officer and the suspect?" 111 S.Ct. at 1804. *Jimeno* required no proof that the suspect intended to consent to a search of the bag in his car.

In *Illinois v. Rodriguez*, *supra*, 110 S.Ct. 2793, this Court upheld a warrantless entry by officers with an objectively reasonable belief that the person who consented to their entry had authority to consent, although

the person actually had no such authority at all: "*What [Rodriguez] is assured by the Fourth Amendment itself, however, is not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable.'* US Const, Amdt 4. . . . [I]n order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government--whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement--is not that they always be correct, but that they always be reasonable." 110 S.Ct at 2799 (italics added).

The magistrate in this case carefully reviewed all of the circumstances known to the officers at the time of their entry into the motel room, even conducting a reenactment of the entry. He concluded that the officers reasonably believed they received consent to enter after requesting permission to do so, and that it was unnecessary for the state to prove that the occupants

actually consented to the entry. The magistrate applied the objective reasonableness test that this Court applied to police conduct in *Rodriguez* and *Jimeno*.

The California Court of Appeal overturned the magistrate's ruling solely because the state failed to prove that the defendant *in fact* gave consent, and therefore failed to prove defendant had knowingly consented. In so doing, the Court of Appeal applied an actual consent standard, as did this Court in *Bumper* and *Schneckloth*.

In *Bumper v. North Carolina*, *supra*, 391 U.S. at 543, this Court held that there is no consent where permission to enter results from unlawful coercion, and that "when a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, *in fact*, freely and voluntarily *given*." *Id.*; italics added. This approach was followed in *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at 248-249:

> We hold only that when the subject of a search is not in custody and the state attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate

> that the *consent was in fact* voluntarily given. . . . Voluntariness is a question of fact to be determined from all the circumstances . . . . *Id.*; italics added.

Application of the "consent in fact" test of *Bumper* and *Schneckloth* rather than the "objectively reasonable belief in consent" test of *Rodriguez* and *Jimeno* is significant. *Schneckloth* elaborated that: "The traditional definition of voluntariness we accept today has always taken into account evidence of minimal schooling, low intelligence, and the lack of any effective warnings to a person of his rights; and the voluntariness of any statement taken under those conditions has been carefully scrutinized to determine whether it was *in fact* voluntarily *given*," 412 U.S. at 248, and that, "in examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly *vulnerable subjective state of the person who consents*." 412 U.S. at 229; italics added. *Contrast*: *Colorado v. Connelly*, 479 U.S. 157, 166 (1986).

Plainly, *Schneckloth* looks to the totality of the circumstances, but focuses on the consenting person's *subjective* state of mind; under *Schneckloth*, the question to be answered is, did that person *in fact* voluntarily consent.

In the nearly two years since this Court decided *Rodriguez*, the "consent in fact" test of *Bumper* and *Schneckloth* has continued to coexist, albeit uneasily, with the "objectively reasonable" test.

Like the magistrate and the Court of Appeal here, other courts have simply chosen sides. The courts that apply the *Bumper/Schneckloth* test require the prosecution to prove the suspect actually gave consent. These courts either ignore *Rodriguez* or confine it to the peripheral issue of apparent authority to consent. The cases that apply *Rodriguez* more broadly ignore *Schneckloth* or confine it to the issue of voluntariness.

Thus, in a recent post-*Rodriguez* case, the Ninth Circuit demanded proof of an "unequivocal and specific" consent "freely and intelligently given," and required the prosecution to present "convincing evidence that defendant

has waived his rights." *United States v. Shaibu*, 920 F.2d 1423, 1426 (9th Cir. 1990). In *United States v. Towns*, 913 F.2d 434, 442-443 (7th Cir. 1990), the Seventh Circuit cited *Rodriguez* in finding Towns had authority to consent, cited *Schneckloth v. Bustamonte, supra*, 412 U.S. 218, 219, for the general rule, and found Towns had not actually consented to the search.

Relying on *Schneckloth* after *Rodriguez*, the Tenth Circuit adopted the totality of circumstances test and reiterated the requirement that the prosecution prove the suspect gave actual consent that was "unequivocal and specific" and "freely and intelligently given." *United States v. Price*, 925 F.2d 1268, 1270-1271 and fns. 1 and 2 (10th Cir. 1991).

In *United States v. Lopez*, 911 F.2d 1006, 1011 (5th Cir. 1990), the Fifth Circuit upheld an entry by a police officer, on conflicting testimony whether consent was actually given. The court noted that, under *Schneckloth*, whether consent was given is a question of fact. The court held that it was reasonable for the officer to believe consent was given. The opinion omits mention

of *Schneckloth*'s requirement that the prosecution prove consent was, in fact, voluntarily given.

Post-*Rodriguez* decisions in several states exhibit similar confusion. *E.g.*, *State v. Paredes*, 810 P.2d 607, 610 (Ariz.App. 1991) ["state must establish by clear and positive evidence that consent to search was freely and intelligently given"]; *State v. Brings Plenty*, 459 N.W.2d 390, 399-400 (S.D. 1990) ["State has the burden of showing voluntariness by clear and convincing evidence that the search was the result of a free, intelligent, unequivocal and specific consent. . ."]; *Viveros v. State*, 799 S.W.2d 458, 461 (Tex.App. 1990); *State v. Grovier*, 808 P.2d 133, 136 (Utah App. 1991). In *People v. Henderson*, 568 N.E.2d 1234, 1254 (Ill. 1990), the Illinois Supreme Court held that *Rodriguez* controls where the issue is whether consent was given, but not where the issue is whether the consent was voluntary. In *Wilkerson v. State*, 594 A.2d 597, 602-606 (Md.App. 1991), a Maryland appellate court extended *Rodriguez* and *Jimeno* beyond apparent authority to consent and scope of consent, and applied the objective reasonableness standard where the existence of consent

was disputed: "The literal question, then, before the Court is not whether [defendant] voluntarily consented to the search of the automobile and the container on the back seat, but only whether [the police] reasonably believed he did." However, in arriving at this conclusion, the Maryland court simply ignored *Schneckloth* and *Bumper*, assuming, perhaps, that the actual consent test had been implicitly repudiated by *Rodriguez* and *Jimeno*.

3. The apparent contradiction between the "consent in fact" test of *Bumper* and *Schneckloth* and the "objectively reasonable" belief in consent test of *Jimeno* and *Rodriguez* must be directly addressed and resolved. If the Fourth Amendment requires only reasonableness on the part of police officers, continued application of the exclusionary rule by courts to enforce the *Bumper/Schneckloth* test disserves the interests of the Fourth Amendment. The exclusionary rule extracts a high price: It distorts the truth finding function of judicial proceedings because it requires exclusion of reliable evidence of crime, damages the community when it frees dangerous offenders, and generates disrespect for the law

and the administration of justice. *Stone v. Powell*, 428 U.S. 465, 490-492 (1976); *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at 268-272 (conc. opn. of Powell, J.). Yet, exclusion cannot deter police officers who have acted reasonably, if mistakenly.

In *Michigan v. Tucker*, 417 U.S. 433, 447 (1974), this Court explained:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular officers, or their future counterparts, a greater degree of care toward the rights of an accused. Where official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

The deterrent effect of the exclusionary rule is weakest where the consented entry results from a reasonable police misapprehension of relevant facts. A

decision suppressing evidence cannot alter their perception of facts in future cases. As recognized in *People v. Gurley*, 23 Cal.App.3d 536, 553, 100 Cal.Rptr. 407, 419 (1972):

> In the situation where the officers act reasonably on the evidence before them . . . the exclusion of evidence seized with [defendant's] apparent consent will not prevent similar conduct in the future under similar conditions. No deterrence is involved if the officers have acted in good faith on the facts as they appeared, because presumably they will be entitled to, and will, so act again in the future.

4. Until the actual consent requirement of *Bumper* and *Schneckloth* is put to rest, *Rodriguez* and *Jimeno* will be understood by some courts as exceptions to an altogether different general rule. This Court should state that *Rodriguez* and *Jimeno* express basic Fourth Amendment jurisprudence. The California Court of Appeal's express rejection of the officer's objectively reasonable belief as justification for his entry squarely presents the question.

Maryland's appellate court may have assumed that the actual consent test had been repudiated by *Rodriguez*, but its opinion suggests the way to a reconciliation of this Court's two lines of authority. It observed that before *Rodriguez*,

> [m]any had viewed consensual searches as instances of Fourth Amendment waiver, as cases of the protection being rendered inapplicable by virtue of the voluntary consent of one authorized to give such consent. In that framework of analysis, consent was measured objectively from the vantage point of the hearing judge and on the basis of all historic data available at the time of the hearing. Was valid consent actually given by one actually authorized to do so?
>
> [*Rodriguez*,] however, conceptualized consent as a way of satisfying the Fourth Amendment merits, that is, as one of the recognized exceptions to the warrant requirement. To satisfy the warrant requirement or to satisfy any of its exceptions, of course, are ways of satisfying the Fourth Amendment

> commandment to be reasonable. In that framework of analysis, the issue of consent has to be viewed through the eyes of the policeman who conducts the search. What matters is not what the judge ultimately knows at the time of the hearing but rather what the policeman knew at the time of the search. The critical question is not whether voluntary consent had actually been given but only whether the policeman behaved reasonably in thinking it had.

Wilkerson v. State, *supra*, 594 A.2d at 603.

Bumper and *Schneckloth* can be reconciled with *Rodriguez* and *Jimeno* if it is recognized that each of these lines of authority speaks to a different audience.

Bumper and *Schneckloth* speak to the police officer. They describe what the officer in the field must do to satisfy the Fourth Amendment: The officer need not advise the person of a right to refuse consent, but the officer does *seek* actual knowing, voluntary consent. The officer determines, from the totality of the circumstances known to the officer at the time, whether he or she has obtained it. The officer takes into account a variety of

factors, including the person's intelligence level, educational level, and subjective vulnerability, *if* a reasonable person in the officer's position would have been aware of them. *Schneckloth* does not describe the function of the hearing judge; the court does not seek actual consent from the totality of circumstance made known to the court at the time of the hearing.

On the other hand, *Rodriguez* and *Jimeno* speak to judges, not to police officers. They describe the function of the court reviewing the officer's actions. The court does not require proof that the person in fact gave knowing consent, but only that the officer behaved reasonably in thinking he or she had.

Judged by this analysis, the standard applied by the Court of Appeal in this case was clearly erroneous. That court ruled that, absent proof of actual consent, the officer's belief, however reasonable, could not validate the search under the Fourth Amendment, and that the evidence must be suppressed.

On the record in this case, a reviewing court could conclude that substantial evidence supports the

magistrate's finding that Officers Henry and Vaden reasonably believed consent was given to enter the room. Officer Henry knocked on the door, said "Hello" to the occupant he saw when the door opened, explained the reason for the officers' presence, and asked for permission to enter to investigate. Both officers at the door testified that one or more occupants responded, "Yes." Indeed, one of the occupants testified his wife said, "Jimmy" before he saw the officers in the room. There is no evidence that the consent was obtained by coercion, duress, or during custody.

However, the Court of Appeal failed to determine whether the officers reasonably believed the room's occupants consented to the entry, because it ruled as a matter of law that the Fourth Amendment required the prosecution to prove the occupants actually consented, "knowingly, freely and intelligently." Since that ruling was based on a misapprehension of applicable principles, this Court should grant the petition for a writ of certiorari in

order to reconcile its two tests for lawful consent. *See Illinois v. Rodriguez*, *supra*, 110 S.Ct. at 2801-2802; *cf. Florida v. Bostick*, ___ U.S. ___, 111 S.Ct. 2382 (1991).

CONCLUSION

For the foregoing reasons, we respectfully request that the Petition for a Writ of Certiorari to the California Court of Appeal for the Sixth Appellate District be granted.

DATED: March 5, 1992.

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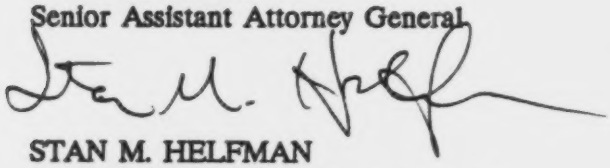

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APPENDICES

APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	FILED: 9/4/91
Plaintiff and Respondent,	)	H007679
v.	)	(Santa Clara County Super. Ct.
STEPHEN HARDEN,	)	No. 138208)
Defendant and Appellant.	)	

On appeal after a plea of guilty to possession of methamphetamine for sale, defendant Stephen Harden claims the trial court erred in denying his motion to suppress evidence.

FACTS

At approximately 3:30 a.m. on October 11, 1989, Mary Camarena, night manager of the Woodmark Hotel in Santa Clara, telephoned police to report suspicious activity going on in room 405. She testified that the occupants of room 405, James and Sindy Bowen, had repeatedly left their room and returned during her 10:30

p.m. to 6:30 a.m. "graveyard" shift. She first saw them at 11:30 p.m. as they passed through the lobby. James left with someone other than defendant and drove off in a white Honda. Sindy left at the same time to retrieve something from a maroon or red Camaro parked in the parking lot. She immediately returned to her room.

At approximately 12:15 a.m., James returned. His companion was not with him. Forty-five minutes later, James left again. This time he asked Camarena if there was any way to enter the hotel other than through the main lobby. She told him there was not. At 2 a.m., James returned. Because the lobby doors were locked, Camarena had to let him in. Later that morning, Camarena heard a noise in the stairwell and went to investigate. There she found James. He was downstairs in the stairwell even though his room was upstairs, on the fourth floor. She gave him directions to this room, whereupon James told her he was going to try to get some sleep and asked for an 8 a.m. wake-up call.

During Camarena's shift, 19 to 20 outgoing phone calls were made from room 405. In addition, the hotel received six to eight calls from people asking for room 405. Because of the late hour, Camarena did not connect any caller who did not know the name of the occupants of room 405.

At 3 a.m., defendant knocked on the hotel's front door. He told Camarena he was there to give his boss, "Jimmy" in room 405, a ride to work. Camarena asked defendant what Jimmy's last name was, and he said "Lewis." Because he had given the wrong last name and because of the hour, Camarena refused to let him come in or call room 405. Camarena thought it suspicious that defendant "came at 3 o'clock in the morning to get his boss ready for work when earlier Mr. Bowen had asked for an 8 o'clock wake-up call, made a comment he was going to try to get some sleep . . . ." At that point, defendant crossed the street and went to a 7-Eleven store.

At 3:20 or 3:30 a.m., James returned to the lobby and told Camarena he was going to let defendant in. Camarena asked if he would be staying for the rest of the night because, if so, there would be a charge for an additional guest. James said they would be leaving soon.

At that point, Camarena called the police. San Jose Police Officers Henry, Vaden, Berchem and Warthan responded to the call at approximately 4 a.m. After speaking with Camarena, they went up to room 405. Vaden testified that when they arrived, the door "was slightly ajar about one to one and a half inches." He could not see inside the room, however. When Officer Henry knocked on the door, the force of his knock caused

the door to open approximately 10 inches. Talking through the open door, Henry told the occupants they were there on a report of "suspicious circumstances," and he asked for permission to enter. The door remained open 10 inches throughout the conversation. Vaden heard more than one voice give permission to enter.

Bercham and Warthan gave similar testimony, although they did not hear the occupants answer Officer Henry. Warthan testified that he had to close the door manually after the officers entered the room. Bercham stated that the conversation with the occupants lasted nearly a minute. When they entered the room, the officers saw contraband in plain view. During a subsequent search of the room and of defendant's person, the officers found marijuana, a scale, several baggies containing a white powdery substance, a pager, a police scanner, and over $2,000 in cash. Defendant and the Bowens were arrested.

At the preliminary hearing, defense counsel requested that the court, as trier of fact, view the scene, and the court granted the motion. At the scene, defendant's investigator testified that he examined the door to room 405 just 30 days after the arrest. He stated that the door was spring-loaded which caused it to close on its own. At the court's direction, the investigator

knocked on the door several times from a slightly ajar position. It opened at most one and one half inches. Furthermore, it closed automatically. It did not need to be manually closed as Officer Warthan testified he did in this case. The court noted that even when the door was knocked so hard that it opened one and one half inches, "the amount of light that is exposed or you can see during the knock from the edge of the doorjamb into the room" was only a quarter of an inch. Even "with a harder knock, it's not much more," the court observed.

In the next demonstration, defendant's investigator held the door open eight to ten inches, the distance the officers testified the door was open. The court noted than on both demonstrations, "the door once released came back to the original position of being adjacent to the doorjamb." The court also noted that when defense counsel opened the door wide enough to allow himself to go in, "the door closed behind him and completely closed including the latch mechanism engaging with the door inset . . . ."

While at the scene, the court heard the testimony of Woodmark Hotel's general manager. He stated that from the date of the arrest until that date, there had been no maintenance work done on the door to room 405. He testified that he would have been aware if repairs had

been done on the door. However, on cross-examination he admitted that there were situations where the maintenance person might notice something wrong and simply fix it without filling out a work order. He stated that he had seen doors that did "not come to a full closure," i.e., "might remain ajar." At that point, court adjourned and did not reconvene until two months later.

At the continued hearing, Officer Henry testified. He stated the door to room 405 was ajar when the officers arrived. He knocked twice, and the door opened approximately 10 inches. When it opened he saw James Bowen sitting on the floor. He did not "recall if the knock opened it completely by itself or when [he] saw the subject on the ground, that [his] hand went to the door . . . ." When asked if the door stayed open by itself, he responded, "It may have, I don't recall." He said "Hello" to the occupants, identified himself as a police officer and told them they were there to investigate some suspicious activity. He asked if they could enter and heard at least two voices say "yes." Once he heard "yes," all four officers entered.

Officer Henry admitted that another officer had told him about the demonstrations that took place at the hotel room. He said "that several people knocked on the door" and that "it opened a small amount." His source

did not "indicate [the door] opened ten inches and stayed open." He admitted he recalled "the admonishment of this court at the initiation of the preliminary hearing about all witnesses not to discuss any testimony amongst themselves during the course of the preliminary examination." Sindy Bowen's attorney asked that Henry's testimony about "maybe [holding] the door open" should be stricken because it contradicted the previous officers' testimony and Henry's police report. The court responded, "I'm going to allow it in but have it go to weight and the credibility."

Defendant Harden and co-defendants James and Sindy Bowen then took the stand and testified that they did not hear the police officers knock on the door or identify themselves before entering the room.

At the conclusion of the preliminary hearing, defendant made a motion to suppress the evidence pursuant to Penal Code section 1538.5 on grounds, inter alia, that defendant did not consent to the warrantless search. The court denied the motion, stating: "And concerning then the 1538.5 motion and the 844 violation, I think counsel are inferring that I'm either going to have to accept the defendant's story that there was only a closed door which was unlocked that the police entered or that the police version is true, that they knocked and it

swung open ten inches. I don't think I'm restricted to that. I think that if I give as much credence to both sides as possible, possibly what happened is that the officers arrived, knocked, the door might have moved. I do not believe it moved ten inches. It might have moved a couple of inches. There might have been a brief view of someone sitting on the floor by one of the officers. I believe the officers did make the announcement they were required to make. Possibly the officers heard what they thought was yes, which would still give credence to the defendant's side of the story. So, I'm not in a position where I have to say one side is lying and therefore I accept the other side and make my decision based on that. I have to decide if there is sufficient evidence of compliance with the knock-notice rule, so that there was proper compliance, and I do find that there's enough evidence to determine there was compliance. There was a knock, there was an announcement of purpose, there was a -- even if the door opened on the knock, I do not consider that a breaking because if you knock on a door that is ajar and it opens, that is not an intent to enter, unless it is an intent to enter; in this case, I don't find it to be. I don't think the officer even knew what he would do when he knocked on it. Therefore I don't consider that a breaking. Before there was an entry, there was an

announcement of purpose; even though 'hello' was in there, I don't think that affects the sequence. Now whether the defendant said 'yes' when they said, 'may we enter or not,' if in fact the officer reasonably believed he heard it, I think that justifies the entry. [¶] So I'll deny the motion and find that the knock-notice, there's sufficient evidence to find that the knock-notice was complied with."

DISCUSSION

Defendant contends his motion to suppress should have been granted because the incriminating evidence was discovered during a nonconsensual warrantless search of the hotel room. He also contends that his pat-down was unlawful. Because we agree with the first proposition, we need not reach the second.

The principles governing review of a trial court's ruling on a motion to suppress are well-settled. (People v. Loewen (1983) 35 Cal.3d 117, 123.) The appellate court must defer to the express and implicit factual determinations of the magistrate if supported by the record. (People v. Trujillo (1990) 217 Cal.App.3d 1219, 1223-1224.) However, it need not defer to the magistrate's or superior court's conclusions of law. (People v. Williams (1988) 45 Cal.3d 1268, 1301; People v. Lawler (1973) 9 Cal.3d 156, 160.)

Here, defendant first made his suppression motion at the preliminary hearing. He brought the motion again before the superior court based on the preliminary hearing transcript and the factual findings of the magistrate. The superior court denied the motion without comment.

The issue revolves around what the magistrate's findings were. One clear finding was that he "[did] not believe [the door] moved 10 inches. It might have moved a couple of inches." Thus, the magistrate indicated he did not believe any of the four officers' testimony that the door was knocked open 10 inches. He also stated that "[t]here might have been a brief view of someone sitting on the floor . . . ." The "brief view" finding must have meant that the magistrate believed the door closed automatically, as it had in all the demonstrations. Again, the magistrate did not accept the officers' testimony that Henry talked to the occupants of room 405 through the open door for nearly a minute. The magistrate did, however, find that the officers made "the announcement they were required to make."

The magistrate next stated, "Possibly the officers heard what they thought was yes, which would still give credence to the defendant's side of the story. So, I'm not in a position where I have to say one side is lying and

therefore I accept the other side and make my decision based on that. . . . [I]f in fact the officer reasonably believed he heard [permission to enter], I think that justifies the entry." The attorney general, in arguing that the magistrate found Officer Henry received valid consent to enter, stated: "Although not the most crystal-clear statement, the only rational interpretation of the magistrate's words is that he was making a factual finding that the officer heard what he thought was permission to enter." But "giv[ing] credence to the defendant's side of the story," the other rational interpretation of the magistrate's words is that he found the defendants did not actually give permission. The magistrate specifically refused to find that either the police or defendants were lying.

These were his factual findings, to which we must defer because they are supported by the evidence. We independently review, however, his conclusions of law. The magistrate concluded that the officer's belief that permission had been given was sufficient to justify a non-consented to, warrantless entry. We disagree.

"Under the [Fourth] [A]mendment, a warrantless entry by the police into a residence is at least presumptively unreasonable and therefore unlawful. [Citations.] [¶] The rule applies whether the entry is

made to search for evidence [citations] or to seize a person [citations]. It applies no less when, as here, the dwelling entered is a guest room in a hotel or motel. [Citations.]" (People v. Williams, supra, 45 Cal.3d at p. 1297.) "The defendant bears the burden of showing that the police officers acted unlawfully. [Citation.] When the defendant has shown a warrantless entry, the burden shifts to the prosecution to prove that the entry was nevertheless reasonable. [Citations.] The prosecution must show, for example, the presence of exigent circumstances -- a burden that is heavy indeed. [Citations.] [¶] If the prosecution fails to carry its burden, the defendant need do nothing more to be entitled to suppression of the primary evidence . . . ." (Id., at p. 1300.)

The only potential exception to the warrant requirement applicable to this case is consent. That is the basis upon which each of the officers justified his entry into room 405. However, the court specifically refused to find that defendants were lying when they unequivocally testified that they had not given the officers permission to enter. Moreover, two of the officers testified that they did not hear any response from the occupants of room 405.

When the People seek to justify a search on the ground consent was given, they have the burden of proving that the defendant's manifestation of consent was knowingly, freely and intelligently given (Bumper v. North Carolina (1968) 391 U.S. 543, 548). Consent will not be lightly inferred. (Johnson v. Zerbst (1938) 304 U.S. 458.) Whether consent was freely given must be determined by the facts and circumstances of each individual case. (People v. Challoner (1982) 136 Cal.App.3d 779; People v. James (1977) 19 Cal.3d 99, 106.) Here, the People did not meet their burden of proving that consent was knowingly given, as the magistrate refused to find that defendants' testimony was not credible. Where, as here, "the prosecution fails to carry its burden, the defendant

need do nothing more to be entitled to suppression of the primary evidence . . . ." (People v. Williams, supra, 45 Cal.3d at p. 1300.)

The judgment is reversed.

Cottle, J.

WE CONCUR:

Agliano, P. J.

Elia, J.

People v. Harden
H007679

APPENDIX B

Sixth Appellate District No. H007679
S023352

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

Filed: 12/11/91

v.

STEPHEN HARDEN, Appellant

Respondent's petition for review DENIED.

LUCAS
Chief Justice